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No. 88-1147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF OKLAHOMA,
Petitioner,

v.

CHESTER LEE BROOKS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals for the State of Oklahoma

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF MUSCOGEE (CREEK) NATION AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF MUSCOGEE (CREEK) NATION AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 36.1, the Muscogee (Creek) Nation moves the Court for leave to file the attached brief *amicus curiae* on the side of respondents in opposition to the petition for a writ of certiorari in this case. *Amicus* requested the parties to consent to the filing of this brief. Respondents have consented, but the petitioner has refused consent. By order of the Court, respondents were granted time until March 30, 1989, to file their opposition.

Amicus is a federally-recognized Indian tribe with a longstanding treaty relationship with the United States and an established, well-organized tribal government.

E.g., Board of County Comm'rs v. Seber, 318 U.S. 705 (1943). Petitioner and the United States challenge the decision below by contending that the Nation has no reservation, and that the Nation and its members are subject to virtually total state authority and control on all Indian-owned lands restricted against alienation by federal law. A holding by this Court in favor of petitioner on these grounds would have a devastating impact on the Nation and its members, for it would deprive the Nation of virtually all its governmental authority.

The Nation's governmental interest is vital to it, and differs from that of any party. *Amicus* submits the attached brief in order to show that the jurisdictional status of restricted Creek allotments has no direct bearing on the judgment below, and to call the Court's attention to the full history of decisions by this Court and the lower federal and state courts precluding state jurisdiction and upholding federal and tribal jurisdiction over Oklahoma Indian lands, including restricted Five Tribes allotments. Because of this history and the consistency of lower federal and state court decisions upholding federal jurisdiction and denying state authority, there is no occasion for this Court's review of this case.

For these reasons, *amicus* requests that its motion for leave to file the attached brief *amicus curiae* be granted.

Respectfully submitted,

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BRIEF OF MUSCOGEE (CREEK) NATION AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS

Amicus is an important federally-recognized Indian tribe with a continuous treaty relationship with the United States, starting in the earliest years of the Republic, and with an established, well-organized tribal government. *E.g., Board of County Comm'rs v. Seber*, 318 U.S. 705 (1943). Its governmental authority would be devastated if the Court were to rule favorably on the contentions presented by petitioner. Petitioner argues that the Nation has no reservation and virtually no governmental authority over restricted lands owned by its members. The Nation has a vital interest in protecting its governmental authority, and its corresponding exemption

from state jurisdiction. This authority and exemption are established in prior decisions of this Court and all modern decisions on this and related subjects by lower federal and state courts.

STATEMENT

Amicus does not agree with the "Nature of the Controversy" as set out at pp. 4-7 of the Petition,[1] or that any of the three questions presented by petitioner are raised by the decision below.

Amicus also differs in many respects with the Statement presented by the United States, particularly with its "jurisdictional history of the Indian Territory" (Br., pp. 2-8). *Amicus* specifically denies the contention that "the long-held understanding has been that actions by Indians on Indian allotments within the former territory of the Five Civilized Tribes are subject to the civil and criminal jurisdiction of the State to the same extent as if they involved non-Indians and occurred on non-Indian land" (United States Br., p. 2). While *amicus* responds to some of the contentions in the United States' Statement in the body of this brief, *amicus* suggests that the best and most objective summaries of the jurisdictional history of the Creek Nation, its governmental authority and its lands are found in: (1) *Harjo v. Kleppe*, 420 F.Supp. 1110, 1118-1142 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978); (2) *Indian Country USA v. Oklahoma Tax Comm.*, 829 F.2d 967, 970-972, 974-981 (10th Cir. 1987), *cert. denied sub nom., Oklahoma Tax Comm. v. Muscogee (Creek)*

[1] This is not, for example, "one of three parallel cases" involving jurisdiction over restricted Five Tribes allotments (Pet., pp. 4-5). This Court has denied a petition for writ of certiorari already in *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), *cert. denied*, —— U.S. ——, 109 Sup. Ct. 795 (1989). This case and *Hodel* do not present the jurisdictional issues of concern to petitioner.

Nation, —— U.S. ——, 108 Sup. Ct. 2870 (1988); and (3) *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1440-1442 (D.C. Cir. 1988), *cert. denied*, —— U.S. ——, 109 Sup. Ct. 795 (1989).

Amicus defers to respondents with respect to discussion of the proceedings below.

SUMMARY OF ARGUMENT

I. In dismissing the criminal informations the courts below applied the rules established by this Court with regard to state taxation of sales by Indian smokeshop operators. *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985); *Washington v. Confederated Colville Tribes*, 447 U.S. 134 (1980); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). Those rules are the same, irrespective of whether a state does or does not have general criminal and civil jurisdiction over Indian lands: the state may tax sales to non-Indians and not tax sales to Indians. This case does not, accordingly, present the question of principal concern to petitioner and the United States—the State's criminal and civil authority over Indians on restricted Five Tribes allotments.

2. Petitioner and the United States contend that even sales to Indians on restricted Five Tribes allotments may be taxed by the State, because—unlike any other trust or restricted lands—these allotments have absolutely no immunity from state jurisdiction and the tribes have essentially no jurisdiction over them. This Court should not consider this question in this case because—

a. the federal statute defining "Indian country," 18 U.S.C. Sec. 1151, plainly includes restricted Five Tribes allotments; e.g., *United States v. Ramsey*, 271 U.S. 467 (1926);

b. decisions of this court shortly after statehood held that federal authority and Indian country jurisdiction remains on restricted Five Tribes allotments, *e.g.*, *United*

States v. Wright, 229 U.S. 226 (1913), and all recent decisions by both federal and state courts have consistently sustained Indian country status of trust and restricted lands in Oklahoma;

c. the reservation and jurisdictional status of restricted Creek allotments should not be reviewed at this interlocutory stage in this case on a record devoid of detailed evidentiary materials as to the jurisdictional history of Creek lands; and

d. the practical difficulties of checkerboard jurisdiction in eastern Oklahoma jurisdiction are far more manageable than would be the devastating impact on the Five Tribes' governmental authority of a decision subjecting the Tribes and their members to complete state regulatory control and taxing authority.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW, MODIFIED AFTER REHEARING, DOES NOT SQUARELY PRESENT THE QUESTION OF WHETHER OKLAHOMA HAS GENERAL CRIMINAL AND CIVIL JURISDICTION OVER RESTRICTED ALLOTMENTS OF THE FIVE TRIBES.

The Oklahoma Court of Criminal Appeals (modified decision) held that the criminal informations in this case must be dismissed because they "did not relate specifically to . . . cigarette sales to non-Indians or off-reservation Indians," but pertained to all sales, including sales by Indians to Indians. (Pet. App. p. 14a). Petitioner and the United States do not contend that the sufficiency of the information merits review by this court, and plainly it does not.

The modified decision of the Court of Criminal Appeals also leaves open the primary issue raised by petitioner: whether Oklahoma has general criminal and civil jurisdiction over restricted allotments of the Creek Nation and Five Tribes. However that question is answered, under

controlling decisions of this Court the State can tax cigarette sales to non-Indians by Indian sellers, but not sales to Indians, and can impose reasonable record-keeping requirements on operators of Indian smokeshops. E.g., *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985); *Washington v. Confederated Colville Tribes*, 447 U.S. 134 (1980); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

Chemehuevi and *Colville* arose on Indian lands that *are* subject to general state criminal and civil jurisdiction under "Public Law 280." [2] The presence of state criminal and civil jurisdiction in these cases was not, however, relevant to this Court's determination that the states involved could tax sales of cigarettes to non-Indians.[3] By contrast, *Moe*, *supra*, arose on a Reservation where the state has criminal but not civil jurisdiction.[4] This Court

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[2] Act of August 15, 1953, ch. 505, 67 Stat. 588, codified as amended at 18 U.S.C. Sec. 1162, 25 U.S.C. Secs. 1321-1326, 28 U.S.C. Sec. 1360, 1360 note. *See, e.g., Colville*, 447 U.S., *supra*, at 142, n. 8. Public Law 280 has ben interpreted by several recent decisions of this Court. E.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Washington v. Confederated Bands of the Yakima Indian Nation*, 439 U.S. 463 (1979); *Bryan v. Itasca County*, 426 U.S. 373 (1976).

[3] That conclusion followed instead from this Court's determinations that the incidence of the challenged state tax fell on the non-Indian buyer, 447 U.S. at 151, that federal law did not preempt the state tax and that the tax did not interfere with the principle of tribal self-government. 447 U.S. at 154-157. The Court also determined that "the State's interest in assuring the collection of sales taxes from non-Indians enjoying the off-reservation services of the State was sufficient to warrant the minimal burden imposed on the tribal smokeshop operators" to keep records and remit taxes. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987).

[4] Mont. Code Ann. Sec. 2-1-301 (1987). The presence of state criminal jurisdiction (but not civil authority) played no part in the Court's analysis.

reached the same result in *Moe* as in *Chemehuevi* and *Colville*. Sales of cigarettes by Indian smokeshops to non-Indians are likewise taxable, and sales to Indians are not taxable, in states without any criminal or civil jurisdiction over Indian lands. *Stagner v. Wyoming State Tax Commission*, 682 P.2d 326 (Wyo.), *appeal dismissed*, 469 U.S. 876 (1984) (relying on *Moe* and *Colville*).

Petitioner is thus simply wrong that "the instant case squarely presents the question of the authority of the State of Oklahoma . . . over Indians on restricted Indian allotments, specifically including . . . allotments to members of the Five Civilized Tribes. . . ." (Pet. p. 6). The presence or absence of state criminal and civil jurisdiction in Oklahoma is irrelevant to the state's taxing authority over sales by Indian smokeshops. That taxing authority is the same in either situation, as the court below recognized in its modified decision on re-hearing. The decision below treats Indian "smokeshops" on restricted Creek allotments in the same manner as smokeshops on tribal or allotted lands in other states, and applies this Court's controlling cases—in fact vindicating Oklahoma's taxing authority over sales to non-Indians.[5] The decision below thus gives no occasion for review in this Court.

II. THIS COURT SHOULD NOT REVIEW THE "IMPLICIT HOLDING" OF THE COURT BELOW THAT RESTRICTED CREEK ALLOTMENTS ARE INDIAN COUNTRY UNDER FEDERAL LAW.

Petitioner's real complaint is that the court below "implicitly" held that the restricted Creek allotment on which the smokeshop is located is "Indian country" under 18 U.S.C. Sec. 1151. (Pet. p. 14). Petitioner and the United States actually contend for a unique and extreme rule to be applied only to the Five Tribes: that—unlike

[5] Under petitioner's view, sales by Indian smokeshops to Indians would also be taxable on Five Nations allotments. In Part II, we show that this is not an issue worthy of review by this Court.

on all other trust or restricted Indian lands—Indians on restricted Creek allotments have no immunity from state jurisdiction, that the reservation of the Creek Nation has been abolished, and its governmental authority has been effectively dissolved. Under this extreme position, restricted Creek allotments would be subject to essentially the same state regulatory control as land purchased today by a tribal member in, say, downtown Dallas or Kansas City,[6] and the Nation would have no effective governmental authority despite decades of federal policies and programs dedicted to revitalizing and developing their self-governing powers. Such a rule would obviously "implicate"—indeed, devastate—the Creek Nation's sovereignty (Compare United States Br.., p. 17).

The "implicit holding" of the court below does not merit this Court's review at this time in this case for several reasons. As we show below, it is simply not true that "the entire history of (the Five) Tribes since before the turn of the century" has rejected the Indian country status of restricted Five Tribes allotments and recognized complete state jurisdiction over them. (Compare U.S. Br., p. 12) The language of the Indian country definition in the revised 1948 U.S. Code clearly applies to Five Tribes allotments. Moreover, decisions of this Court shortly after statehood, as well as every modern decision of federal and state courts, treat restricted allotments as Indian country and under federal authority.

A. The "Implicit Holding" Of The Court Below That Restricted Creek Allotments Are Indian Country Is Compelled By The Language Of 18 U.S.C. Sec. 1151.

Section 1151,[7] as revised in 1948, provides:

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[6] The sole important difference would be that the restricted allotment could not be sold, even for nonpayment of taxes.

[7] Act of June 25, 1948, ch. 645, Sec. 1, 62 Stat. 757; as amended by Act of May 25, 1949, ch. 139, Sec. 25, 63 Stat. 94.

Sec. 1151. *Indian country defined*

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

There is no credible argument that restricted Five Tribes allotments are not "Indian country" under Section 1151 (c). Restricted Five Tribes allotments are plainly in the class of "all Indians allotments." "Indian titles have not been extinguished" to them.[8]

This Court even prior to the 1948 revision of the United States Code refused to make any distinction between trust and restricted allotments in Oklahoma with respect to federal Indian country jurisdiction. In *United States v. Ramsey*, 271 U.S. 467, 469 (1926), this Court explained that:

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[8] Moreover, restricted Five Tribes allotments also constitute "dependent Indian communities" under the Section 1151(b). See *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *United States v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986); *United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982); *United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir., 1971). Oklahoma cases have applied this standard as well to preclude state jurisdiction on Oklahoma Indian lands. *CMG v. State*, 594 P.2d 798 (Okla.), *cert. denied*, 442 U.S. 992 (1979) (Chilocco Indian School is a dependent Indian Community, and thus "Indian country;" there is accordingly no state juvenile court jurisdiction).

> [t]he authority of the United States . . . to punish crimes occurring within the state of Oklahoma, not committed by or against Indians, was ended by the grant of statehood . . . . (citations omitted) But authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before . . .

The Court went on to conclude:

> . . . that the difference between a trust allotment and a restricted allotment, so far as that difference may affect the status of the allotment as Indian country, was not regarded as important. . . . In practical effect, the control of Congress, until the expiration of the trust or the restricted period, is the same.

Id., at 470-471.

The Court further observed in *Ramsey*:

> . . . it would be quite unreasonable to attribute to Congress an intention to extend the protection of the criminal law to an Indian upon a trust allotment and withhold it from one upon a restricted allotment; and we find nothing . . . which would justify us in applying the term 'Indian country' to one and not to the other.

Id., at 471-472.[9]

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[9] Similarly, in *United States v. Hellard*, 322 U.S. 363, 366 (1944), this Court in a case involving descent of a restricted Creek allotment held that the United States is an indispensable party to any suit to partition the allotment, and observed:

> Restricted Indian land is property in which the United States has an interest. "This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust." *Heckman v. United States*, 224 U.S. 413, 437. Though the Indian's interest is alienated by judicial decree, the United States may sue to cancel the judgment and set the conveyance aside where it was not a party to the action. . . . The governmental interest throughout the partition proceedings is as clear as it would be if the fee were in the United States.

In the past Congress has granted state criminal or civil jurisdiction over "Indian country," as it did in Public Law 280, *supra*. Oklahoma is not a Public Law 280 state. Petitioner and the United States claim Oklahoma nonetheless has general criminal jurisdiction over restricted allotments belonging to members of the Five Tribes by virtue of congressional enactments just prior to Oklahoma statehood. But discussed in Section II B, *infra*, all recent decisions of *both* federal and state courts conclude that Congress has never granted this jurisdiction to Oklahoma.

B. The "Implicit Holding" Of The Court Below That Restricted Creek Allotments Are Indian Country Is Consistent With Prior Decisions Of This Court And All Current Decisions Of All Lower Federal And State Courts.

1. *Decisions of this Court.*

This Court has never held that Oklahoma has general and complete criminal jurisdiction over restricted Five Tribes allotments, or that restricted Five Tribes allotments are not "Indian country." Petitioner and the United States refer principally to *Marlin v. Lewallen*, 276 U.S. 58 (1928).[10] In *Marlin*, this Court observed that Congress prior to statehood extended the laws of Arkansas over many activities by members of the Five Tribes. However, *Marlin* held that Arkansas laws imposing curtesy were *inapplicable* to descent of Creek allotments because those state laws were preempted by two agreements between the Creek Nation and the United States, ratified by Congress.[11]

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[10] Petitioner and the United States also rely heavily on *Ex Parte Nowabbi*, 61 P.2d 1139 (Okla. Cr.1936). As we show in Section II B 2, however, *Nowabbi* has been withdrawn and disapproved, and is inconsistent with all modern federal and state decisions.

[11] Both before and after statehood, Congress has allocated jurisdiction over Five Tribes lands between the United States, the State

Marlin is thus entirely consistent with continued federal jurisdiction over restricted Five Tribes allotments, a jurisdiction in fact confirmed by decisions of this Court shortly after statehood. For example, in *Tiger v. Western Investment Co.*, 221 U.S. 286, 309 (1911), this Court sustained Congress' power to continue restrictions on the alienation of Creek allotments, observing specifically that "[i]n passing the enabling act for the admission of the state of Oklahoma. . . Congress was careful to preserve the authority of the government of the United States over the Indians, their lands and property, which it had prior to the passage of the act." And in *United States v. Wright*, 229 U.S. 226 (1913), this Court specifically held that restricted Five Tribes allotments remained "Indian country" for purposes of enforcing federal laws prohibiting the introduction of liquor. The Court rejected the argument that the 1906 enabling act had repealed this Indian country status, relying in part on the Eighth Circuit's contemporaneous holding in *United States Express Co. v. Friedman*, 191 Fed. 673 678-679 (8th Cir. 1911), which also specifically rejected the argument that Five Tribes restricted allotments "ceased to be Indian country upon admission of Oklahoma as a state." (See 229 U.S. *supra* at 238). See also *Ex Parte Webb*, 225 U.S. 663 (1912); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.), p. 779, n. 85. ("[a]t least some Indian country laws were applied to restricted Indian lands in Indian Territory" between 1897 and statehood).

As Petitioner (Pet., p. 17) and the United States (Br., p. 15) note, this Court sustained application of state estate taxes to some restricted Five Tribes property in

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and the Tribes. The United States so concedes, Br., p. 7, n. 4. If, of course, Congress had absolutely surrendered jurisdiction over Five Tribes lands to the State, the subsequent statutes granting state jurisdiction over particular and limited subject areas referred to by the United States would be unnecessary.

its closely divided decision in *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). That state taxing authority was, however, pursuant to a specific statutory grant, and no statute has abolished Indian country status of restricted Five Tribes allotments. The *Oklahoma Tax Commission* decision predates the 1948 codification of the Indian country definition in Section 1151(c). More broadly, the observations of the Court in 1943 are no longer completely accurate today. The policy of Congress since the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. Sec. 501 *et seq.*, has been to strengthen tribal self-government in Oklahoma. E.g., *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), *cert. denied*, —— U.S. ——, 109 Sup. Ct. 795 (1989). Implementation of this Act and of modern federal Indian policies of tribal self-determination and economic self-sufficiency, such as contained in the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. Secs. 450 *et seq.*, have revitalized the Nation and the other Five Tribe governments. Today, the Nation and other Five Tribes governments administer millions of dollars of federal programs and services annually, run schools and have active and functioning tribal courts.[12]

True, Congress *considered* the abolition of the Five Tribes reservations and governments in the period prior to statehood, but it decided not to carry through that policy. Instead, Congress has revitalized the self-governing powers and autonomy of the Five Tribes in the past several decades. Petitioner and the United States selectively present only the parts of the history that are consistent with their parsimonious and inaccurate viewpoint. That viewpoint, we show in the next section, is contrary to the analysis of *every* state and federal court to consider these questions in the past two decades.

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[12] E.g., *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), *cert. denied*, —— U.S. ——, 109 Sup. Ct. 795 (1989).

2. Decisions of Lower federal and state courts.

Petitioner and the United States rely heavily on a 1936 decision by the Oklahoma Court of Criminal Appeals, which did hold that the State had criminal jurisdiction over a murder committed by an Indian on a restricted Choctaw allotment. *Ex Parte Nowabbi*, 61 P.2d 1139 (Okla. Cr. 1936). There is no reason, however, to believe *Nowabbi* is good law today. That decision was severely criticized, disapproved and withdrawn by the Oklahoma Supreme Court in *State ex rel May v. Seneca-Cayuga Tribe*, 711 P.2d 77, 81, and n. 17 (Okla. 1985) and—as the Oklahoma Supreme Court noted in *Seneca-Cayuga, supra*—has also been strongly criticized by the major Indian treatise, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, pp. 777-780, esp. n. 84. (1982 ed.) The Oklahoma state court system declined three times to follow *Nowabbi* in this very case.

In recent years, every lower state and federal court to address trust and restricted Indian lands in Oklahoma has agreed that "Indian country" in Oklahoma includes: (1) restricted Osage allotments, *State v. Burnett*, 671 P.2d 1165 (Okla. Cr. 1983); *United States v. Burnett*, 777 F.2d 593 (10th Cir. 1985), *cert. denied*, 476 U.S. 1106 (1986); (2) Kiowa trust allotments, *State v. Littlechief*, 573 P.2d 263 (Okla. Cr. 1978) (agreeing with unpublished federal district court decision to the same effect, see 573 P.2d at 264), and (3) tribal trust lands, compare *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985) (Quapaw tribal lands) with *Indian Country USA v. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987) *cert. den. sub. nom., Oklahoma Tax Commission v. Muscogee (Creek) Nation*, —— U.S. ——, 108 S.Ct. 2870 (1988) (tribal lands of Creek Nation).

Indian Country USA, supra, is particularly instructive for present purposes. In denying state authority to regulate tribal bingo on tribal trust lands belonging to the

Creek Nation,[13] the Tenth Circuit carefully reviewed the turn of the century legislation relied on by petitioner and the United States (particularly the 1897 Indian Appropriation Act and 1906 Oklahoma Enabling Act) and concluded that:

> Although the federal legislation described above seriously undermined the authority of the Creek Nation, we are not persuaded that Congress intended or acted to completely abolish Creek Nation jurisdiction over tribal lands, to divest the federal government of its authority, or to permit the assertion of jurisdiction by the State of Oklahoma.
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> . . . The language of the Oklahoma [enabling] act, read in its historical context, suggests that Congress intended to preserve its jurisdiction and authority over Indians and their lands in the new State of Oklahoma until it accomplished the eventual goal of terminating the tribal governments, assimilating the Indians and dissolving completely the tribally-owned land base—events that never occurred and goals that Congress later expressly repudiated. The State has failed to cite any acts of Congress that clearly reveal an intent to divest the federal and tribal governments of jurisdiction over Creek tribal lands and to confer such authority on the State of Oklahoma.

829 F.2d at 978, 979-980. (footnote omitted)

All the recent decisions of lower state and federal courts concerning the Indian country status of Oklahoma Indian lands—including the decision below—are congruent, are consistent with this Court's analysis in *Tiger, Wright and Ramsey, supra* Section II B 1, and apply the usual rules of federal Indian country jurisdiction to

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[13] The Tenth Circuit did not specifically address the jurisdictional status of restricted Creek allotments. 829 F.2d *supra* at 970 and 980 n. 5. 18 U.S.C. Sec. 1151 makes no distinction between tribal lands and restricted allotments. See Section II A, *supra*.

Oklahoma Indian lands. This indicates that the "Indian country" status of restricted Five Tribes allotments will be resolved adequately and consistently by lower courts and will not require plenary review in this Court.

There are, it is true, a few authorities in addition to *Nowabbi, supra*, going against the modern trend on this issue. Like *Nowabbi*, these authorities predate the statutory Indian country definition in 18 U.S.C. Sec. 1151 and have not been followed in recent decisions. For example, a 1943 decision by the Tenth Circuit stated that Oklahoma has full criminal and civil jurisdiction over all Oklahoma Indians. *United States v. Hester*, 137 F.2d 145, 147. Petitioner calls that dicta to the Court's attention (Pet., pp. 18, 32-33), but does not advise the Court that this dicta has been disavowed by the Tenth Circuit in *Indian Country USA*, 829 F.2d *supra* at 980, n. 6.[14]

C. The Contentions Pressed By Petitioner And The United States Should Only Be Considered In A Case Squarely Presenting Them And Upon A Full Evidentiary Record Developed At The Trial Court Level.

The United States would deprive the Nation of its reservation and subject its members' lands to complete state jurisdiction. (Br., p. 17) This Court has recognized that the continued existence of an Indian reservation depends on the language of the relevant acts of Congress, their legislative history and all circumstances surrounding their passage, including the negotiations with the affected tribe or tribes. E.g., *Solem v. Bartlett*, 465 U.S. 463, 467-

[14] Similarly, in 1942 the Secretary of the Interior did express a somewhat equivocal view that Oklahoma had general criminal jurisdiction over Five Tribes restricted allotments. But the Secretary's letter admitted that he "cannot speak with certainty with respect to the present jurisdiction" (United States App. p. 1a) and recommended that "a bill . . . might be presented to Congress on the subject." (*Id.* at p. 5a).

472 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586-587 (1977). Similarly, the Court has observed that the extent to which a particular tribe's sovereignty has been altered, divested, diminished or supplanted with the state jurisdiction requires "a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856 (1985).

The Creek Nation disputes the contentions of the United States. *Amicus* does not believe this Court needs to rule upon these contentions, given the clarity of Section 1151 and the consistency of decisions in federal and state courts since its enactment in 1948. If the Court does wish to consider these questions, a far more extensive record is required than has been developed in this case [15] —which arises on a motion to dismiss informations, does not involve any of the Five Tribes or the United States as a party, and does not directly present the question of continued reservation existence or any detailed evidentiary materials concerning the jurisdictional history of Creek lands.

D. The "Implicit Holding" Of The Court Below Does Not Create Practical Difficulties Which Require Consideration Of This Case By This Court.

Positing that the Nation has no reservation, the United States expresses concern over administrative difficulties it believes would attend exercise of federal jurisdiction over checkerboarded Five Tribes allotments (Br., pp. 18-19). The reality, as respondents point out, is that Indian country jurisdiction exists in checkerboard fashion over much of Oklahoma, as well as elsewhere—such as South Dakota on the Indian-owned lands in the disestablished

[15] The Nation has been a party in numerous cases where such a record has been developed. E.g., *Muscogee (Creek) Nation v. Hodel, supra*; *Harjo v. Kleppe, supra.*

Lake Traverse Reservation and counties severed from the Rosebud Reservation. Compare *DeCoteau v. District of County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). In actual practice "checkerboard" jurisdiction is far less troublesome than the United States admits. In areas where these is split jurisdiction, cross-deputization or similar agreements are common between law enforcement personnel. Under such agreements, for example, a state police officer will arrest Indians suspected of crimes, later surrendering the suspects to federal or tribal authorities if it turns out the offense occurred on Indian land.

In any event, the intent of Congress is controlling, and there is no evidence that Congress has ever intended to subject tribal members on restricted allotments and the Five Tribes themselves to complete state taxing and regulatory control. Rather, as at Lake Traverse and Rosebud, Congress was at most evidently "satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs." *DeCoteau*, 420 U.S. *supra* at 446. As this Court observed in *DeCoteau*, "[i]n such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments," *ibid*, which results of course in a checkerboard jurisdiction depending on land ownership.

In terms of practical consequences, the balance of equities is decidedly in favor of *amicus*. The impact of full state criminal, civil, taxing and regulatory jurisdiction over all its members lands would be utterly destructive of the Nation's vital powers of self-government, much more disastrous than implementation of practical arrangements to administer the checkerboard jurisdiction feared by the United States.

CONCLUSION

The petition should be denied.

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